



Town of Derry
"Derry, New Hampshire's Place to Be"

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DEPARTMENT OF PUBLIC WORKS,

Michael Fowler, P.E., Director

Thomas A. Carrier, Deputy Director

PW09-150

February 19, 2009

Thelma Murphy
US Environmental Protection Agency
1 Congress Street, Suite 1100 (CIP)
Boston, MA 02114-2023

RE: Comments - Draft Municipal Separate Storm Sewer System General Permit

Dear Ms. Murphy,

The Town of Derry is submitting the attached comments on the Draft Municipal Separate Storm Sewer System General Permit (MS4GP) for your consideration.

The Town of Derry is committed to maintaining and improving the environmental health of the town in the interest of the health, safety and welfare of its residents and its environment. Our commitment has been demonstrated through development of an environmental program that includes: ensuring compliance of our own operations; outreach to our residents and local businesses to increase public awareness, knowledge, and participation; participation in local educational and watershed organizations; and participation in or attendance at regulatory workgroups, training, and workshops in order to keep apprised of ever-changing regulatory environment.

To accomplish this, the Town worked toward a comprehensive and holistic approach which combines all of the environmental compliance programs under one department to address duplication of overlapping programs. We try to anticipate trends in state and federal environmental regulations, and evaluate those trends to make efficient, cost-effective, and logical modifications to our own programs. One example of our accomplishment has been in the development and adoption of our Stormwater Ordinance and Regulations which already includes some of the required aspects of EPA's Draft 2008 MS4GP.

We recognize and appreciate EPA's goal in improving the quality of stormwater so as to minimize its impact to receiving waters, specifically "Waters of the US". The Town of Derry does not limit itself to that definition, but instead includes all surface waters, wetlands, and groundwater within the town that is not typically included the EPA's definition.

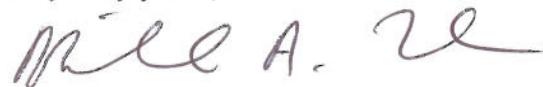
The Town of Derry has some general concerns and comments with the draft MS4GP. These concerns are summarized below. More specific comments are included in an attachment to this letter.

1. The Draft MS4GP is excessively and unnecessarily prescriptive in its requirements and lacks flexibility that would allow permittees to meet the intent of the Clean Water Act by using information gathered under the first five-year permit. In its current form, the draft permit takes on a one-size-fits-all approach and ignores accomplishments, information gathered, and lessons learned that would allow them to modify their program and tailor it to their own jurisdiction. Examples would include the frequency of catch basin inspection/cleaning, street sweeping, or stormwater structure inspection/maintenance. Under the first permit, permittees gathered information to optimize their inspection/cleaning/maintenance program so as to conduct future activities in a practical, efficient, and cost-effective manner. In addition, permittees may have collected data during the first permit that would aid in assessing priority high-pollutant load areas in order to focus its efforts.
2. Complying with the requirements of the draft permit would require a significant increase in the level of resources. Some of these include the effort and costs associated with the outfall monitoring and analytical testing, and certain tasks at EPA-specified schedule (without allowing flexibility based on permittee's experience and knowledge such as catch basin inspections and cleaning, street sweeping). In the current economic climate, municipal budgets are being trimmed to levels that may require staff reductions and cuts to all programs. In addition, the timing of the public release of the draft permit was such that any additional funding needed to comply with the draft permit (if funds were even available) could not be budgeted for the next fiscal year. As a result, permittees are destined to fail due to lack of funding and resources alone.
3. The draft permit penalizes those permittees that may have gone above and beyond the minimum requirements of the first permit by ignoring these accomplishments and expediting schedules making first and second year tasks more intensive. For instance, there are some requirements under the draft permit that specify certain activities to be conducted by a certain date with additional activities to be conducted within a few months of completion the activities. Permittees that may have proactively conducted some of these activities under the 2003-MS4GP would now have an expedited schedule for implementing or completing the subsequent activities, increasing the level of resources required during a shorter time period. An unfortunate consequence of this would be that permittees would thus be inclined to do the absolute minimum under the new permit because it would be a disincentive to be proactive.
4. There is significant and excessive overlap of existing regulations that are already overseen and regulated by other agencies or under alternative state and federal programs. The draft permit requires permittees to further administer these programs over the regulated community by imposing requirements for permittees to become the state's and EPA's enforcement arm where permittees' enforcement ability is limited compared to the state or federal agencies ability.

The Town of Derry appreciates the opportunity to provide these comments. We look forward to working with USEPA to develop a flexible yet proactive stormwater management program that strives toward meeting the intent of the CWA.

If you have any questions, please contact Craig Durrett or me at (603) 432-6144

Very truly yours,



Michael A. Fowler, P.E.
Director of Public Works

Cc/att: Craig Durrett, Derry Public Works

/csd

Comments

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#	Section	Comment	Suggestion
Contents of the SWMP			
1	1.10.2 2nd bullet	The SWMP must contain a "Listing of all receiving waters" ... "and number of outfalls that discharge to each water." Since the requirements of the permit apply only to "Permittee-owned" outfalls, should it be assumed that the listing is limited to the same, or does it require and inventory of all outfalls owned by private or commercial entities, located on private property, whether regulated or not under alternative state and/or federal programs.	The town recognizes the importance of having records of all outfalls, particularly in "high pollutant load areas", and for the implementation of an IDDE program. However, listing ALL privately owned outfalls would require access to private properties to conduct detailed investigation solely for the sake of mapping.
2	1.10.2 2nd bullet	The draft MS4GP encourages permittees to "document in the SWMP all public drinking surface water and groundwater that may be impacted by the discharges." It is unclear what EPA constitutes as "impacted" whether solely negative impacts due to potential pollutant sources or also positive impacts where both EPA and NHDES advocate for infiltration for groundwater recharge.	This should be clarified to further define "impacted" and whether it is positive impact (groundwater recharge) or negative impact (high pollutant load within a regulatory defined area relative to the supply intake or Well Head Protection Area).
2	1.10.2 2nd bullet	All public drinking water systems are already mapped by towns and the state(NHDES). It is also this permittees experience that the state prefers to keep some details of drinking water sources confidential as a precaution under the Homeland Security envelope. Having information publicly available through the SWMP regarding potential opportunities to negatively impact public supplies is not in the public's best interest.	Since all public drinking water systems are already mapped by towns and the state, it might be more appropriate to document this program under an evaluation looking at high pollutant load areas and their potential to impact drinking water supplies. The SWMP should only include enough information to indicate that an evaluation was conducted, and that it was conducted under the regulatory authority of pre-existing NHDES drinking water programs.
Requirements to Meet Water Quality Standards			
3	2.1.1.c.	Define discharges that cause or contribute to an exceedance of applicable water quality standards. In it's current usage, the presence of any detectable concentration of a compound, even that which may be naturally occurring or ubiquitous in the environment, could be considered as falling under the definition and require extensive and unnecessary efforts and expense on the part of the permittee in an attempt to "eliminate the condition".	The definition should ensure that more effort is not required on the part of the permittee to conduct expensive modeling to prove or disprove whether the presence of a compound in a discharge from a permittee-owned discharge is "contributing" to an exceedance.

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#	Section	Comment	Suggestion
Discharges to Impaired Waters without a TMDL			
4	2.2.2	How does this apply to waters impaired due to naturally occurring parameters such as iron which is commonly high in stratified drift aquifers along streams, or low pH which is typically low in rainfall and thus causing elevated metals due to the change in ionic state?. A stream may be impaired for iron due to natural occurrence and not present in discharges from outfalls, whereby correcting the impairment may be infeasible.	
5	2.2.2	How does this apply when the cause of the impairment is from a natural source present in a discharge. For example, the source of an impairment due to either e. coli or cyanobacteria indirectly caused by phosphorus loading may be from indigenous or migratory wildlife (ducks or fur-bearing mammals).	
6	2.2.2	How does this apply when the source of the impairment is non-stormwater related, regulated extensively under other programs, or from anthropogenic sources? For example, one impairment may be identified as Non-Native Aquatic Plants. The efforts to eradicate non-native aquatic plants, address the source of this impairment, and conduct outreach in "state waters" are already spearheaded by several state agencies. Another well known state and region-wide impairment is that of mercury, the source of which is atmospheric deposition and being addressed through national initiatives. Is there an exclusion for this and other impairments identified as being out of the control of or infeasible for municipalities to address?	

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Discharge to a Chloride Impaired Water in NH			
7	2.2.3	<p>This section requires that the Permittee develop and implement a written "Plan" to reduce chloride in discharges to chloride impaired surface waters whether directly or indirectly. The permit specifies that the plan must include certain "requirements" to apply to numerous non-permittee entities. It is unclear whether EPA intends this section to only apply to public and private entities that perform deicing operations on behalf of the town, or whether that includes everyone within the municipality, public and private, whether deicing public or private roads and parking lots. If it is the latter, is EPA requiring the development of a local regulatory mechanism (i.e., ordinance)? In the absence of one, how does a requirement in a permittee plan have jurisdiction over non-permittee entities?</p>	<p>For comments #7 through #10, the solution may best be addressed through a state or regional training, certification, and/or licensing program, particularly in light of the transient and regional nature of applicators and their inconsistent involvement in this type of business. The program could be similar to the state's pesticide applicators licensing program. EPA should work with state agencies (NHDES) to develop and implement a state salt/deicing licensing and training program.</p>
8	2.2.3	<p>The definition of "storm event" is too broad to include "any event that triggers the use of the deicing chemicals." As written, an overnight freezing of minor snowmelt during the prior day could "trigger" a private contractor, store owner, or any level employee of any private or commercial establishment located within an MS4 to place varying amounts as low as a few handfuls of deicing chemicals at the entrance to a establishment.</p>	<p>The triggering event could be more specific to include only those events which required commercial application (by a "licensed" or "Certified" applicator applying at specified threshold amount of deicer (i.e., per cubic yard or ton of sand/salt mixture).</p>

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9	2.2.3	<p>It is neither reasonable nor practical to impose a requirement for permittees to mandate that every private entity report such information especially on such small occasions. While we recognize that published studies by the State of NH identify commercial establishments as the single highest contributor of chloride in certain MS4s, EPA should understand that plowing and deicing contractors used by commercial establishments are transient and regional. They therefore cross political and watershed boundaries in any single event, and may use deicing mixtures of varying sand to salt ratios depending on their supplier. In addition, private entities engaged in deicing operations for commercial and private clients conduct such activities on a seasonal basis to supplement their usual or primary business such as seasonal landscape and construction activities. These entities are not routinely in the process of keeping track of the specifics of their activities, nor have they undergone any specific training, therefore spreading rates (frequency and quantity) are constantly changing. We believe any data submitted to us would be minimal and without any validity, absent any State-mandated training and certification/licensing program.</p>	<p>Relative to chloride, it would more reasonable and logical to reword this section that the permittee shall minimize to maximum extent practical, the permittees contribution of the pollutant that could potentially contribute to the impairment. And shall minimize those of others through outreach and education efforts as dictated in other areas of the permit. For other impairments such as mercury or pH, an exclusion would be most appropriate.</p>
10	2.2.3	<p>The "requirement(s)" in the plan for private applicators to follow specific guidance relative to application rates and conduct certain maintenance (calibration of spreaders) is virtually impossible to enforce on the local level.</p>	<p>New or Increased Discharges to Impaired Waters</p>
11	2.2.4.b	<p>It states that for "New discharges to impaired waters" the permittee must "Prevent all exposure to stormwater of the pollutants for which the waterbody is impaired". Preventing all exposure to chloride is virtually impossible as it is a necessary for public safety, it is placed only in areas where snow and ice (i.e., stormwater) will occur, and it is somewhat ubiquitous in the environment. It is also unreasonable to require this for naturally occurring pollutants or impairments out of any control of the permittee (pH, mercury). In addition, "preventing" nonpermittees (private or commercial entities) from contributing chloride is currently impossible to do.</p>	

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12	Public Education and Outreach	<p>Effective programs must...demonstrate that the "defined goal" of the program has been achieved. EPA defines the goal is to "create change in behavior and knowledge so that pollutants are reduced". While knowledge can be demonstrated through outreach efforts, how does EPA propose proving a change in behavior? Does EPA have ways of proving that pollutants were reduced other than conducting extensive, regular, periodic analytical testing which is both resource and cost intensive. A review of BMP Outreach website does not provide much if any insight into this issue.</p>	
13	Illicit Discharge Detection and Elimination Program	<p>This section requires implementation of the IDDE program that includes an evaluation of sources of non-stormwater to determine whether they are significant contributors of pollutants. These include many potential sources in "High Pollutant Load" areas that are already regulated under numerous other state and federal pollution prevention and spill response programs, rules, and regulations. These potential sources include but are not limited to car dealers, car washes, gas stations, industrial manufacturing areas, and colleges. The draft permit results in significant overlap of existing programs by assigning investigative and enforcement responsibility that are already the responsibility of higher level agencies. In addition, it would be virtually impossible and extremely burdensome to require a permittee to force an existing facility to change its practices or incur additional expense to prevent any pollutants from leaving its site when it has already been approved by higher level agencies.</p>	<p>The existing programs are already designed to prevent pollution to the maximum extent practical and respond to spills and pollution causing activities. A more feasible approach would be to provide exclusions for permittees relative to overlapping areas and to allow permittees to defer to state or federal regulations and agencies for appropriate follow-up. Specific areas should include different waste waters, and storage and handling of virgin products and other regulated hazardous and universal wastes. In its current version, it can be interpreted that permittees would have incur excessive costs for enlisting the services for 24-hour on-call emergency response contractors.</p>

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14	2.3.4	Given the broad definition of "Waters of the US" and the specific requirement to walk "all waters in the MS4", is the permittee required under the draft permit to investigate and sample all non-permittee owned outfalls located on private property?	
15	2.3.7.1.b. Buildings and Facilities	<p>Good Housekeeping and Pollution Prevention for Permittee Owned Operations</p> <p>This subparagraph requires significant overlap of various regulations including SPCC, hazardous waste, plumbing codes, etc. It assumes that local building codes and that nationally accepted standards are inadequate and must be verified and reverified on a continual basis. In many municipalities, the school district and emergency services (fire department) are separate from the main municipal operations (Public Works) responsible for managing the stormwater program and are thus funded under different programs. It is understandable that "old" buildings and facilities may be in question,, a MS4 whose facilities are newer and were required to comply with current nationally accepted building codes should not be required to verify its own building inspections.</p>	The permit should just reference that the Permittee conduct an evaluation of applicable pollution prevention programs to ensure full compliance with all applicable regulations and requirements that could result in exposure of pollutants to stormwater.
16	2.3.7.1.d. Roadways and Storm Systems	The draft permit is overly prescriptive and lacks any flexibility relative to catch basin inspections and cleanings, and street and sidewalk sweeping. Under the MS4-2003, efforts were made to inspect and clean all MS4 catch basins. The goal was to collect information to develop an efficient and logical cleaning schedule for all catch basins within the MS4. Some may require annual cleaning while others require cleaning on a much less frequent basis (every 3-4 years). It is not prudent to ignore the data collected by permittees under the MS4-2003 and requiring more frequent cleaning when not necessary. given that most catch basin cleaning contracts are on a per-catch basin basis, it would also lead to unnecessary expenditure of funds for contractors to have to inspect/clean catch basins that do not need to be.	The permit should allow flexibility to existing permittees to develop their own schedule based on their knowledge and experience within their own MS4. This will allow a more efficient and cost-effective program for each permittee.

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17	2.3.7.1.d. Roadways and Storm Systems	Sidewalk sweeping is typically not a task performed by municipal permittees. This task would require dedication of additional resources and purchase of new equipment, and could be a year-round project.	
18	Outfall Monitoring Program	It is unclear in this section whether the monitoring program must include all nonpermittee-owned outfalls located on private property or just permittee-owned outfalls as is specified for other requirements elsewhere in the draft permit.	
19	3.2 Dry Weather Screening and Analytical Monitoring	Requiring analytical testing of every flow is unnecessary and expensive, particularly since further investigation and sampling of the source of the flow overlaps and is thus required under the IDDE program. The draft permit does not allow flexibility for field screening techniques that could triage the investigation by allowing such field measurements for pH, temperature, conductivity, TSS, or DO.	This permittee understands that dry weather flow can be suspicious. However, it would more efficient and cost-effective to allow permittees to conduct a triage approach involving field measurements and/or tracking the source of the discharge before requiring analytical testing. A simple investigation may find a benign source (garden hose runoff with kids playing in a sprinkler) for which expensive analytical testing is really not required. Alternatively, if the source could be an illicit discharge, then a decision to conduct analytical testing could be made at that time.

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20	3.3 Wet Weather Analytical Monitoring	<p>Conducting wet weather monitoring may provide some useful data in evaluating overall stormwater quality, however the results would be limited and provide only a completely random single snapshot in time, for which the presence of pollutants will not be known until well after a storm event. Tracking the pollutants to their source could be very extensive in both time (having to collect samples during several subsequent storm events) and costly (analytical samples from numerous manholes, catch basins, or other sources entering the MS4). The logistics of performing these tracking activities is unnecessarily intensive given that there is no guarantee that the pollutants will be detected each time, particularly if it was the result of a intermittent discharge. In addition, the presence of some pollutants (e.coli or phosphorus, low pH) may be the result of wildlife (e.coli or phosphorus), naturally occurring sources (low pH of rainfall).</p>	<p>The permit should allow flexibility to allow permittees to adopt a triage approach to investigating sources of pollutants in stormwater. Permittees should be allowed to use direct knowledge and professional judgement in determining the need</p>
21	4.1.2	<p>4.1 Requirements for MS4s in New Hampshire</p> <p>It is stated that NHDES may necessitate additional water quality certification requirements to protect water quality and to meet additional conditions in order to obtain or continue coverage under this permit. This is a very broad statement without any apparent listed conditions that would direct NHDES to implement the additional conditions in order to be covered under the federal permit. This raises concerns of duplication of regulation over permittees, particularly since NHDES declined to become a delegated authority for the MS4 program.</p>	<p>It would be useful for permittees to be informed within the bounds of the permit as to what authority NHDES has to determine permittees eligibility under the permit, and under what conditions or circumstances NHDES would necessitate additional requirements to meet eligibility.</p>

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5.0 Program Evaluation			
22	5.1	<p>There is confusion in the evaluation and reporting requirements relative to definition of BMP in Appendix A and when "permission" is required from EPA to change or modify a BMP. By definition in Appendix A, it could include any structure or fixture, or a practice or operating procedure. Alternatively it could refer to a BMP as described in the NOI. This should be clarified. To what specific degree must permission from EPA be sought?</p>	
6.0/7.0 Requirements for State or Tribal MS4s Non-Traditionals and Requirements for Transportation Agencies			
23	6.1 and 7.1 Public Education	<p>There are statewide issues associated with all permittees that include significant overlap between municipal MS4s and the state and transportation MS4s, specifically impairments due to chloride and pending TMDLs. The most recent 303d report by NHDES indicates that there are many more impairments due to chloride throughout NH than the 4 watersheds identified along I-93 in southern NH which draft TMDLs are being prepared. It would be prudent that the regulatory agencies be involved in a state-wide public outreach effort instead of the permit's current approach to only require outreach and chloride reduction efforts in select MS4s.</p>	
24	6.2 and 7.2	<p>EPA states that the non-traditional MS4s (state, tribal, and transportation) may rely on EPA and State environmental agency for enforcement assistance. What enforcement support can municipal MS4s expect from these same agencies and are they willing to commit to providing this support when needed?</p>	